

DOCKET FILE COPY ORIGINAL

DA 97-1697

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Amendment of Section 73.202(b),)	MM Docket No. 97-178
Table of Allotments,)	RM-8329
FM Broadcast Stations.)	RM-8739
(West Hurley and Rosendale, New York,)	
North Canaan and Sharon, Connecticut))	

Released: August 15, 1997

By the Chief, Allocations Branch:

2. According to Natole, West Hurley is listed in the 1990 U.S. Census, as a census

Natole's request was filed as a counterproposal in MM Docket 93-17, which proposed the allotment of Channel 273A and/or Channel 255A to Rosendale, NY. Because he failed to comply with Section 1.420(a) of the Commission's Rules which requires that all pleadings be served on the petitioner, his counterproposal was dismissed in that proceeding. However, since Channel 255A was not allotted to Rosendale, we stated that his proposal would be the subject of a separate Notice of Proposed Rule Making. See Report and Order, 10 FCC Rcd 11471 (1995), recon. denied on other grounds, 11 FCC Rcd 3607 (1996), app. for rev. denied on other grounds, adopted June 23, 1997, released July 2, 1997 (FCC 97-226). A petition for reconsideration of the June 23, 1997, Memorandum Opinion and Order was filed on August 1, 1997, by the State University of New York ("SUNY"). Therefore, final action in this proceeding may be withheld pending resolution of MM Docket 93-17.

designated place, with a population of 2,252 persons. Natole states that a station operating on Channel 255A at West Hurley could provide a new 60 dBu service to 280,818 persons within an area of 3,055 square kilometers, in addition to providing West Hurley with its first local aural transmission service..

3. SHU states that North Canaan, with a 1990 U.S. Census population of 3,284 persons, is an incorporated community with the "typical governmental services, businesses and cultural activities of a community." In addition to providing North Canaan with its first local aural service, SHU submits that the allotment would provide a first noncommercial educational service to 17,787 persons within an area of 736 square kilometers and a second noncommercial educational service to 11,865 persons in a 459 square kilometer area. SHU claims that, during the summer, North Canaan provides the residents and visitors with cultural and music fairs and that there is a strong interest in the classical music and National Public Radio news reports that it intends to offer. In support of the reservation of Channel 277A at North Canaan, SHU states that there is no channel within the reserved portion of the FM band available for use because of the proximity of TV Station WGRB at Schenectady, NY, which operates on Channel 6. Further, it states that there is no channel other than Channel 277A which can be allotted to North Canaan. To accommodate the allotment at North Canaan, SHU also requests that Channel 273A be substituted for Channel 277A at Sharon, Connecticut, and that the license of Station WQQQ(FM) be modified to specify the alternate Class A channel. SHU states that the substitution of channels will also enable Station WQQQ(FM) to increase its power from 3 kW to 6 kW. In addition, SHU pledges to reimburse the licensee for the reasonable costs involved in its change of channel.

4. SHU appears to question the status of West Hurley as a community for allotment purposes. It states that West Hurley is a Census Designated Place ("CDP") with a 1990 U.S. Census population of 2,252 persons. However, SHU contends that the fact that West Hurley is listed in the U.S. Census is not definitive of community status because it states that the Census describes CDP's as "densely settled concentrations of population that are identifiable by name but are not legally incorporated places. Their boundaries. . . have no legal status nor do these places have officials elected to serve traditional municipal functions." Further, it contends that West Hurley, rather than being an independent community, is only a suburb of Kingston, NY, with a population of 23,095 persons, which has two AM and four FM stations licensed to it, as well as being adjacent to Woodstock, NY, with a population of 6,290 persons, and one FM station. Therefore, SHU believes that further information concerning community status should be requested.

5. SUNY, licensee of Station WFNP, which shares time on Channel 204A at Rosendale, opposes SHU's petition. It argues that it is nothing more than an untimely request for reconsideration of the Report and Order in MM Docket 93-17 which allotted Channel 273A to Rosendale, NY.² SUNY points out that the Report and Order in MM Docket 93-17 rejected SHU's jointly filed counterproposal to allot Channel 255A, instead of Channel 273A, to

² SUNY subsequently submitted an application for Channel 273A at Rosendale. See BPED-960117M7.

Rosendale, substitute Channel 273A for Channel 277A at Sharon, CT, reallocate Channel 273A to Washington, NY, and modify Station WQQQ's construction permit to specify the alternate channel and community of license. SHU also proposed to retain Channel 277A at Sharon and reserve the channel for noncommercial educational use.³ SUNY states that, as it argued in MM Docket 93-17, the required site restriction on the use of Channel 255A at Rosendale would not permit Station WFNP to provide noncommercial educational service as effectively as it can on Channel 273A, thus resulting in diminished service to the station's audience. SUNY submits that SHU had an opportunity to argue for the allotment of Channel 255A at Rosendale but lost the opportunity because its proposed reallocation of Channel 273A from Sharon to Washington and the modification of Station WQQQ's authorization violated Section 1.420(i) of the Commission's Rules. Further, rather than submit a timely petition for reconsideration, SUNY contends that, prior to the opening of the filing window for the Rosendale channel, SHU submitted the instant petition for rule making which again requests a reshuffling of allotment cities. It argues that SHU appears to believe that its plan to bring noncommercial educational service to northwestern Connecticut can be accomplished by an allotment to whatever city of license it deems convenient at any given moment, arguing that the selection of North Canaan is predicated on finding a city of license which is comparatively superior to the mutually exclusive request of Natole for an allotment at West Hurley.

6. In reply, SHU contends that the proper course was not the filing of a petition for reconsideration, as argued by SUNY, but rather the filing of the instant petition for rule making. First, SHU states that it does not dispute the Commission's action in dismissing SHU's earlier counterproposal due to the lack of mutual exclusivity between the proposed and existing channels for Station WQQQ. Second, SHU states that Station WQQQ has since commenced operation and has developed a relationship with Sharon's residents and does not wish to relocate. Based on this fact, SHU states that it does not wish to disrupt the community's existing service. Third, SHU states that its desire to provide a noncommercial educational classical programming service to North Canaan and northwest Connecticut is predicated upon the interest shown by the area's residents and visitors. SHU argues that SUNY's opposition is based solely on private goals, that is, it wants to retain Station WFNP's present transmitter site which only works on Channel 273A and to operate on an unreserved commercial channel, even though the existence of TV Channel 6 problems could have enabled the reservation for noncommercial use of either Channel 273A or Channel 255A at Rosendale. SHU contends that the retention of Station WFNP's current site, as well as operation on a commercial channel for SUNY's private profit motive, are inadequate when compared to the benefit which would be derived by the allotment of a first local transmission service at North Canaan and a first and second noncommercial service to the community and surrounding area. In addition, SHU states that the substitution of channels at Sharon will permit Station WQQQ to improve its service from its present 3 kW to 6 kW. Finally, SHU states that if Channel 255A is substituted at Rosendale, there is a large potential transmitter site area available. In fact, SHU states that the transmitter site which it has proposed in its application for Channel 273A at Rosendale is that of an existing tower which can also be

³ See fn. 1, *supra*.

used, under Section 73.215 of the Commission's Rules, for Channel 255A.⁴

Technical Summary

7. Channel 255A can be allotted to West Hurley in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.⁵ Channel 277A can be allotted to North Canaan, New York, with a site restriction of 2.8 kilometers (1.7 miles) northwest to avoid a short-spacing to Station WDRC-FM, Channel 275B, Hartford, CT, Station WHRL, Channel 276A, Albany, NY, and Station WODS, Channel 277B, Boston, MA.⁶ Channel 255A can be allotted to Rosendale with a site restriction of 10 kilometers (6.2 miles) north to avoid a short-spacing to Station WPLR, Channel 256B, New Haven, CT, and Station WFSO, Channel 202A, Olivebridge, NY.⁷ Channel 273A can be allotted to Sharon, CT, in compliance with the Commission's mileage separation requirements and can be used at Station WQQQ's presently licensed transmitter site.⁸ We note that Channel 273A cannot be used at the site specified in Station WQQQ's pending application (BPH-960517IB) to change its antenna structure, transmitter location, height above average terrain and effective radiated power. However, this application was filed after SHU's petition for rule making. Therefore, consistent with Section 73.208(b)(1) of the Commission's Rules, Station WQQQ's application is not entitled to protection from SHU's petition. However, Station WQQQ may submit comments as to why the transmitter site specified in its outstanding application should not be considered as merely a site preference but should be preferred over the new allotment at North Canaan. In addition, SHU's petition for rule making to substitute Channel 255A for Channel 273A at Rosendale was filed prior to the filing of the applications for use of Channel 273A at Rosendale, and it appears that the transmitter sites proposed in the pending applications cannot be used in compliance with the Commission's mileage separation requirements. However, in accordance with Section 73.208(b)(1), the applicants for the Rosendale channel are not entitled to have their individual site preferences protected by the rule making proposal. Therefore, a copy of this Notice of Proposed Rule Making and Order to Show Cause is being sent to each of the affected applicants. Canadian concurrence in the allotment of Channel 255A at West Hurley, NY, and Channel 255A at Rosendale, NY, are required since the two communities are located within 320 kilometers (200 miles) of the U.S.-Canadian border.

8. We believe the proposals advanced by both Natole and SHU warrant consideration

⁴ Section 73.215 permits applicants to specify transmitter sites that are short-spaced to other existing or proposed allotments based on contour protection.

⁵ The coordinates for Channel 255A at West Hurley are 42-00-06 North Latitude and 74-06-00 West Longitude.

⁶ The coordinates for Channel 277A at North Canaan are 42-03-21; 73-20-56.

⁷ The coordinates for Channel 255A at Rosendale are 41-55-43; 74-07-45.

⁸ The coordinates for Channel 273A at Sharon are 41-55-08; 73-34-22.

since the proposed allotments could provide either West Hurley or North Canaan with their first local aural transmission service. These proposals are mutually exclusive because West Hurley and Rosendale are located only 8.5 kilometers apart while the Commission's Rules stipulate a minimum distance separation of 115 kilometers for co-channel Class A allotments. Generally, noncommercial educational stations operate within the reserved portion of the FM band (Channels 201-220). However, exceptions have been made where channels in the noncommercial educational band are not available because of foreign allotments or potential interference to operation on VHF Television Channel 6. Here, potential interference to Station WGRB at Schenectady, New York, appears to justify the reservation of a channel at North Canaan in the nonreserved band (Channels 221-300) for noncommercial educational use.

9. Whenever an existing licensee or permittee is ordered to change frequencies in order to accommodate a new channel allotment, Commission policy requires the benefitting party to reimburse the affected station for costs incurred. In this case, SHU has stated its willingness to reimburse the licensee of Station WQQQ for its reasonable costs incurred in moving to Channel 273A.

10. SHU requests that the Commission seek further information concerning the status of West Hurley as a community for allotment purposes. We do not believe that SHU has submitted sufficient information to raise a question as to the status of West Hurley. Commission policy, as set forth in Revision of FM Assignment Policies and Procedures, states that Section 307(b) of the Communications Act requires that allotments be made to "communities" which has been defined as geographically identifiable population groupings. This requirement was deemed to have been met if the place were incorporated or listed in the census. See, 90 FCC 2d 88, 101 (1982). By this wording, it is clear that the listing of unincorporated places, as well as CDP's, in the census satisfies the presumption of community status. See, Bear Creek and Pocono Pines, Pennsylvania, 12 FCC Rcd ____ (DA 97-1565, released July 25, 1997) (find that Pocono Pines is a community for allotment purposes because it is listed in the 1990 U.S. Census as a "Census Designated Place"). Colstrip, Montana, DA 97-336, released May 16, 1997, 12 FCC Rcd ____ (1997), 62 FR 27702, May 21, 1997, Shawsville, Virginia, 12 FCC Rcd 3680 (1997). See also, Hannahs Mill, Milledgeville and Perry, Georgia, 6 FCC Rcd 3753 (1991), recon. granted, 7 FCC Rcd 3944 (1992) (channel allotted based on listing in the census as a CDP, stating that a municipality need not provide every public service on its own in order to merit community status. Channel deleted on reconsideration based on the fact that community no longer listed as CDP and evidence provided to rebut community status). While the Commission can, and has, in the past, questioned the status of communities, both incorporated and unincorporated, this has been based either on the fact that the community is not listed in the census or that the population is so small as to raise community status questions. Here, West Hurley is listed in the census as a CDP and attributed with a substantial population of 2,252 persons. Further, according to the 1995 Rand McNally Commercial Atlas, West Hurley as its own post office and unique zip code. To rebut the presumption of community status, SHU provides no information about the lack of community indicia, merely making the bald statement that West Hurley is not an independent community but a suburb of the larger community of Kingston as well as being adjacent to Woodstock, which also has a greater population than West Hurley. We find that this is

insufficient to overcome the presumption of community status. However, SHU may, in its initial comments herein, provide more detailed information about the lack of community indicia.

11. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
<u>Option I</u>		
West Hurley, New York	--	255A
<u>Option II</u>		
North Canaan, Connecticut	--	*277A
Sharon, Connecticut	277A	273A
Rosendale, New York	273A	255A

12. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Radio South Burlington, Inc. ("RSB"), licensee of Station WQQQ, Sharon, Connecticut, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 273A as proposed herein instead of the present Channel 277A.

13. Pursuant to Section 1.87 of the Commission's Rules, RSB may, not later than October 6, 1997, file a written statement showing with particularity why its license should not be modified as proposed in the Order to Show Cause. The Commission may call on RSB to furnish additional information. If RSB raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, RSB will be deemed to have consented to the modification as proposed in the Order to Show Cause and a final Order will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

14. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

15. Interested parties may file comments on or before October 6, 1997, and reply

comments on or before October 21, 1997, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mark N. Lipp, Esq.
Ginsburg, Feldman and Bress, Chartered
1250 Connecticut Avenue, N.W., Suite 800
Washington, D.C. 20036-2604
(Counsel to Sacred Heart University, Inc.)

Raymond A. Natole
P.O. Box 327
Shokan, New York 12481
(Petitioner for West
Hurley, New York)

16. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

17. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of the Notice of Proposed Rule Making and Order to Show Cause, to the licensee of Station WQQQ and the applicants for Channel 273A at Rosendale, New York, as follows:

Radio South Burlington, Inc.
Station WQQQ
19 Boas Lane
Wilton, CT 06897

Hawkeye Communications, Inc.
131 East 62nd Street
New York, NY 10021
(BPH-960111MN)

Marist College
290 North Road
Poughkeepsie, NY 12601
(BPH-960111BA)

David Fleisher & Melissa Krantz
15 Franklin Lane
Harrison, NY 10528
(BPH-960111MM)

Sacred Heart University, Inc.
5151 Park Avenue
Fairfield, CT 06432
(BPH-960111AZ)

Eric P. Straus
5620 Rt. 9G
Hudson, NY 12534
(BPH-960111MK)

State University of New York
State University Plaza
Albany, NY 12246
(BPED-960111M7)

Aritaur Communications, Inc.
P.O. Box 958
Pittsfield, MA 01202
(BPH-960111MR)

Rosen Broadcasting, Inc.
2001 Pennsylvania Avenue, NW

Radio Rosendale
19 Boas Lane

Suite 400
Washington, D.C. 20006
(BPH-960111AT)

Wilton, CT 06897
(BPH-960111ML)

18. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239) at its headquarters, 1919 M Street, N.W., Washington, D.C.